

November 9, 2016

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Business Data Services in an Internet Protocol Environment, WC Docket No. 16-143; Investigation of Certain Price Cap Local Exchange Carrier Business Data services Tariff Pricing Plans, WC Docket No. 15-247; Special Access Rates for Price Cap Local Exchange Carriers, WC Docket No. 05-25; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, RM-10593

Dear Ms. Dortch,

The Ad Hoc Telecommunications Users Committee (“Ad Hoc”) submits this letter in the above-referenced proceedings in order to address the surge in *ex parte* presentations precipitated by the release of Chairman Wheeler’s “Fact Sheet.”¹ The Fact Sheet describes new rules and policies for resolving the issues raised in the Commission’s Further Notice of Proposed Rulemaking in the BDS proceeding.² Numerous parties have filed *ex parte* presentations challenging or endorsing the proposals in the Fact Sheet and modifying or re-affirming the positions taken by the parties in their Comments and Reply Comments in this proceeding.

In lieu of detailed challenges to those many presentations, and consistent with its own filings in this docket, Ad Hoc will instead respond to certain key proposals in the Fact Sheet. Specifically, Ad Hoc urges the Commission to adopt an order in this proceeding that does the following:

- Fulfills the promise in the FNPRM of a technology-neutral regulatory regime for BDS. The Commission’s regulatory regime must treat low-speed Ethernet services (i.e., services at 100 Mbps or below) no differently from TDM-based

¹ See “Chairman Wheeler’s Proposal to Promote Fairness, Competition, And Investment in the Business Data Services Market,” Fact Sheet, released October 7, 2016.

² *Business Data Services in an Internet Protocol Environment; Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans; Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593, Tariff Investigation Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd 4723 (2016) (“FNPRM”).

DS1 and DS3 services. Transmission protocols are not barometers of competitive conditions. A carrier's use of a different transmission technology cannot, by itself, justify de-regulation; only an adequate level of marketplace competition can justify de-regulation. In the absence of effective competition, end users still need regulatory protections whether the service they use is TDM or packet.³ More specifically, there is no data-based evidence in this record that would justify disparate regulatory treatment of Ethernet and TDM services simply because of differences in technological platform. So long as services of like speeds are subject to the same market conditions, they should be subject to the same regulatory regime. The Commission's price-cap driven rate regulation (with the kind of contracting authority presently available to carriers granted Phase II pricing flexibility) for DS1 and DS3 services should also apply to lower-speed Ethernet services.⁴

- Adopts higher values for critical components of the updated price caps rules. The Fact Sheet proposes to update the price caps rules with a one-time, downward, "catch up" adjustment of 11%, phased in over three years, to capture the efficiency gains that occurred while reform of the rules has been on hold for more than a decade pending FCC action in this proceeding. The Fact Sheet also proposes an annual X factor of 3%.⁵ Ad Hoc continues to support the 25.2% "catch up" adjustment and 4.4% X-factor recommended in its Reply Comments based upon the EU KLEMs data set.⁶
- Ensures that "Phase I" rules *and rates* apply to price caps services. The Fact Sheet proposes to apply "Phase I" pricing rules to all price cap LECs.⁷ The Commission must ensure that both the "Phase I" rules and "Phase I" *rates* will apply to services that had been granted "Phase II" pricing flexibility. In order for customers to "have protection from arbitrarily high prices,"⁸ which is the goal identified in the Fact Sheet itself, the Commission must reset prices in areas that had been granted "Phase II" pricing flexibility to the corresponding price caps rate levels (as described in Ad Hoc's earlier Reply Comments at pages 12 -15). Moreover, this reset cannot be implemented in a manner that discounts the magnitude of any "catch up" adjustment applied to TDM services.

³ Indeed, the proposal outlined in the "Fact Sheet" effectively eliminates technology-based regulatory distinctions for higher-bandwidth TDM services (those at the OC-3 (155-Mbps) and above). The proposal's failure to follow the same approach for lower-bandwidth services is inexplicable and unjustifiable.

⁴ Ad Hoc supports limiting prices for lower-speed Ethernet services entering the price caps regime to a level no higher than the prices for corresponding TDM-based services.

⁵ Fact Sheet at p. 1

⁶ See Ad Hoc Reply Comments, filed August 9, 2016, at 12. The primary criticism regarding use of the EU-KLEMs data set, that it is a value-added index, is misplaced. The inflation measure used in the FCC's price caps plan, GDP-PI, is also a value-added index (see http://www.bea.gov/faq/index.cfm?faq_id=1034) and as such is appropriately paired with a value-added measure of telecom productivity.

⁷ Fact Sheet at 1-2.

⁸ *Id.* at 2.



- Retains tariff filing requirements for price-caps regulated services. As Ad Hoc pointed out in its past filings,⁹ the Commission cannot eliminate tariffs and still have a price caps system to regulate prices because the price caps rules do not prescribe the rates that price caps carriers can charge. The price caps rules are merely a tariff review mechanism that triggers a tariff investigation when carriers file rates inconsistent with the price caps rules. It is the threat of such an investigation that incents carriers to file rates that comply with the rules.

Sincerely,

Colleen Bortling

⁹ Ad Hoc Comments, filed June 28, 2016 at 20 – 21; Ad Hoc Reply Comments at 6 – 11.